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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1907.

No. 123.

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FIRST NATIONAL BANK OF ALBUQUERQUE,
*Appellant.*

*vs.*

GEORGE F. ALBRIGHT, FRANK A. HUBBELL AND F. W. CLANCY,
*Appellees.*

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No. 20399.

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## APPELLANT'S BRIEF.

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MORNING JOURNAL, ALBUQUERQUE, N. M.

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### I.

### STATEMENT OF THE CASE.

This action was commenced in the District Court of Bernalillo County, Territory of New Mexico.

Defendants demurred to plaintiff's complaint. Demurrer was overruled, and defendants electing to stand

upon their demurrer, judgment was given as prayed for, and defendants appealed. The Supreme Court of said Territory reversed the judgment of the District Court, with directions to dismiss the complaint, and from said judgment this cause was brought into this court by appeal.

The following facts appear from the allegations in the complaint:

1. At all the times mentioned in the complaint the First National Bank of Albuquerque was and is now a corporation organized under the National Banking Act, and doing a banking business in the City of Albuquerque, County of Bernalillo, Territory of New Mexico. George F. Albright was Assessor, Frank A. Hubbell was Treasurer and ex-Officio Collector of said County of Bernalillo, and Frank W. Clancy the District Attorney of the Second Judicial District, which included the County of Bernalillo. (Record pp. 1 and 2.)

2. On the 30th day of April, 1903, intending to comply with chapter 40 of the New Mexico Laws of 1891 and the directions of the Territorial Board of Equalization, said bank made a return of its property for the year 1903, listing capital stock, surplus and real estate in a lump sum at $90,000. (Record p. 2.)

3. On June 2nd, 1903, the defendant Albright, under the direction of the Board of County Commissioners, changed said assessment so as to assess the capital stock, surplus and real estate separately; valuing the capital stock, $200,000, at 60 per cent., $120,000; surplus, $24,634.00, at 60 per cent., $16,422.00; included in capital stock without valuation lots 13 and

14 of block 16; and assessed the rest of real estate separately at $13,120.00; and added to the property included in the return of the bank "Fixtures in Zeiger Building, $1,000"; making the total valuation as fixed by the assessor under direction of the Board of County Commissioners, at $150,542.00. (Record p. 2.)

4. The form of the return had been used for some years because of the direction of the Territorial Board of Equalization that the assessment should be upon the capital stock and surplus; and that form of return had been acquiesced in by the taxing officers for years, and was intended to furnish the basis of assessing the shares of stock subject to assessment against the stockholders. The real estate was included in the return because of the provisions of chapter 40, Laws of 1901 hereinafter quoted. (Record p. 3.)

5. The bank appealed to the Board of County Commissioners, and then to the Territorial Board of Equalization, without relief. (Record p. 3.)

6. When the taxes for the year 1903 became due, the bank paid the sum of $5,224.50, being the amount of tax due according to its return, and charged said amount against its stockholders, as provided by law. (Record p. 4.)

7. On the 13th day of July, 1904, the Territory, by the defendant Clancy, commenced suit in the District Court against said bank for the collection of the sum of $3,690.18, which was claimed to be the balance due for taxes of 1903, after crediting said sum of $5,224.50 so paid by said bank. (Record p. 4.)

8. The bank demurred to the complaint of the Territory, but the defendant Clancy, as District Attor-

ney, refused to allow the case to be decided upon the demurrer, and by leave of court and against the objection of said bank, dismissed said cause, without disposing of the prior assessment. (Record p. 4.)

9. At the time of said dismissal, the District Attorney announced that he would cause the assessor or collector to re-assess all the real estate of the plaintiff, and all the personal property above described, and all shares of stock of said bank, and that he would cause the shares of stock of said bank to be valued at sixty per cent. of the capital stock and surplus of said bank, under an alleged direction from the Territorial Board of Equalization, without deducting from the value of said stock the assessed value of the real estate of said bank. And the said District Attorney asserted the right to direct said officers in the exercise of their authority in the assessment of said property, and to arbitrarily re-assess said property without disposing of the prior assessment. (Record pp. 4 and 5.)

10. It was alleged that the basis of valuation of 60 per cent. of the capital stock and surplus of banks was determined beforehand by the Territorial Board of Equalization, without consideration or evidence, and was an arbitrary rule established by said board without authority of law and without evidence and without consideration of the value of the property of said plaintiff and other banks, and that said bank was at all times mentioned in said complaint without remedy before any of said taxing officers or said Boards of Equalization, because of said rule of said Territorial Board of Equalization, determined by them without hearing, and which they and their subordinate taxing

officers declared they were bound to follow. (Record p. 4.)

11. It was asserted in said complaint that said return of said bank was a substantial compliance with the law, and furnished a substantial basis for the valuation of the shares of stock of the stockholders and real estate of said bank. That the manner of return was acquiesced in by the taxing officers, and that by the payment of the full amount of all taxes which might have been collected on any theory, the taxing power of the taxing officers had been wholly exhausted and that they had no right, power or authority to make the threatened re-assessments. (Record p. 4.)

12. It was alleged upon advice of counsel that the personal property of said bank was not subject to taxation; that if the real estate should be assessed separately, then the assessed value thereof should be deducted from the assessed value of stock of said plaintiff, in accordance with the provisions of chapter 40 of the Laws of 1891, and that the shares of stock could not be legally assessed at a higher rate than other property within said Territory. (Record p. 5.)

13. It is also alleged that Albright, as assessor, upon assuming his office in the year 1903, laid down and fixed and announced as his method of valuation that all property except bank property and shares of stock in banks would be assessed on a uniform basis of one-third of its real value; but that because of the direction of the Territorial Board of Equalization, he would assess banks on the basis of 60 per cent. of the capital stock and surplus, in addition to the real estate of said bank, and that Albright as assessor did thereupon adopt and enforce as a general rule for the valu-

ation of property within said county the aforesaid basis of valuation, and did for the year 1903 assess all property other than property of banks and shares of stock in banks at one-third of its real value, and did then and there for said year assess banks at 60 per cent of their capital stock and surplus, and also the real estate of said banks, without deducting the value thereof from the valuation of other property assessed against said banks, and did then and there for said year 1903 assess the plaintiff as hereinbefore described. (Record p. 5.)

14. It was also alleged that the Territorial Board of Equalization and said Clancy usurped the powers and privileges of the taxing officers of said county, and in violation of law, directed and commanded said officers to make assessments against said banks as above set forth, without the exercise of the judgment and discretion vested in them by law in the valuation of property generally, and that said taxing officers, believing that they were subject to the orders and directions of the Territorial Board of Equalization and said Clancy, were ready and willing to make any assessment directed by said officers or any of them, and would make said threatened assessment unless restrained by the court. (Record p. 5.)

15. It was also alleged that said assessment stands as a cloud against the real estate of said bank, and insofar as it remains unpaid, was wholly unauthorized by law; that the valuation contained in the return of said bank is in excess of one-third of the value of all the shares of stock of said bank; that any addi-

tional assessment or re- assessment would be wholly in excess of the valuation fixed for the assessment of all other classes of property, and would be entirely void. And it is alleged upon advice of counsel that under the provisions of the laws of said Territory the value of all property subject to assessment, without regard to its kind or character, is required to be assessed upon a uniform basis; that under the provisions of the National Banking Act, said bank cannot be taxed directly or indirectly except on its shares of stock and real estate, and then only on the general basis that other property within said Territory is assessed; and that by the provisions of said chapter 40, if said real estate is assessed separately, the assessed value thereof must be deducted from the assessed value of the shares of stock. (Rcord p. 6.)

16. It is also alleged that said bank has always paid its taxes promptly, and is ready and willing at all times to bear its just share of the burden of taxation, and that as above alleged it had already paid more than its share of the taxes for the year 1903 upon a just and reasonable valuation of its property subject to taxation, if valued on the same basis that other property was valued in said county and territory. (Record p. 6.)

17. The prayer of the complaint was that the defendant Clancy be enjoined from directing, commanding or causing the defendants Albright and Hubbell to assess or re-assess any of the property of said bank or the shares of stock, for the year 1903; that the defendants Albright and Hubbell be enjoined and forever restrained from assessing or re-assessing any

of the property of said bank or its shares of stock for the year 1903; that the balance claimed to be due on account of the raise and change in the assessment of the property of said bank for the year 1903 be declared illegal and void, and that said Hubbell, as Treasurer and ex-Officio Collector, be directed to cancel the same upon his books, by order of the court; and for all such relief as plaintiff might be entitled to in equity. (Record p. 6.

To the complaint the defendants demurred (record page 7), setting forth thirteen grounds of demurrer. Only one ground, however, stated, comes within the provisions of the code (sub-section 35, sec. 2685, Compiled Laws of N. M. 1897), and that is that the complaint did not state facts sufficient to constitute a cause of action.

As heretofore stated, the demurrer was overruled in the District Court, but upon hearing in the Supreme Court of the Territory, the cause was reversed and ordered to be dismissed.

## ASSIGNMENT OF ERROR.

The court erred in reversing the judgment of the District Court and remanding said cause with instructions to dismiss the complaint.

## II.

## POINTS AND AUTHORITIES.

### TAXATION OF FEDERAL AGENCIES.

This case necessarily involves the question of the extent of the powers of the Territorial authorities in the taxation of national banks. This question was first raised in the year 1819, in the case of McCullough vs. State of Maryland, et al., 4 Wheaton 316. The question before the court was the statute of Maryland requiring the notes of the branch of the United States Bank established in that state to be issued upon stamped paper, subject to a stamp tax. The case involved not only the constitutional power of Congress to establish the bank and of the bank to establish its branches, but also the power of the state to tax such branches. Chief Justice Marshal, who delivered the opinion of this court, after determining that Congress had the power to create the United States Bank and that the bank had the power to establish branches in the State of Maryland, proceeded to lay down the justly celebrated syllogism which has since that time been the guidance of courts upon questions of this nature; namely, "that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring upon one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied," and therefore denied the power of the State of Maryland to levy a tax against said bank.

In 1824, in the case of Osborne vs. Bank of the United States, 9 Wheaton 738, this court was asked to reconsider so much of its former opinion as held that the states had no rightful power to tax banks of the United States; but the court, in an opinion by Chief Justice Marshal, adhered to its former opinion, and declared that the Ohio law attempting to impose a tax upon a branch of the United States was even more objectionable than the Maryland law.

The act of Congress providing for the organization of national banks, passed February 25th, 1863, contained no grant of power to the states to tax national banks in any form, but an amendatory act was passed June 23rd, 1864, which provided that nothing in said act should be construed to prevent all shares in said banks held by any persons or bodies corporate from being included in the valuation of the personal property of such persons or corporations in the assessment of taxes imposed by or under state authority, at the place where said bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that taxes so imposed should not exceed the rate imposed upon shares of any of the banks organized under authority of the state, and also providing that nothing in said act should exempt the real estate of said banks from either state, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed.

In 1868 the act of June 3, 1864 was amended and re-enacted in the form in which it has since appeared in the United States Statutes, as follows:

> Sec. 5219. "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

By the foregoing amendment, the provision "that taxes so imposed should not exceed the rate imposed upon shares of any of the banks organized under authority of the state" was omitted; but this omission was not material, as the prohibition of discrimination in favor of state banks is included in the provision that the shares should be taxed at no greater rate than is assessed upon "other moneyed capital":

*Mercantile Bank vs. New York*, 121 *U. S.* 156.

In the case of Owensboro National Bank vs. Owensboro, 173 U. S. 664, decided in 1898, this court thoroughly reviewed the authorities upon the subject of the extent of the right of the state to tax in cases involving national banks; and after quoting the above

section 5219, this court, by Mr. Justice White, said:

> "This section, then, of the revised statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void."

It must necessarily follow, then, that the right of the Territorial Legislature to impose taxes upon national banks is limited to two classes of property:

(1) Shares of stock in the name of the shareholder, provided that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, and that shares of non-residents shall be taxed in the city or town where the bank is located;

(2) Real property of National Banks to the same extent, according to its value, as other real property is taxed.

It is clear, however, that the foregoing section is permissive, and does not in itself impose such tax; and that without legislative authority upon the part of the Territory, taxing officers would have no power to assess either the shares of stock or the real estate.

The state or territory may, in accordance with the provisions of the Act of Congress, provide for taxation within its limitations, or it may neglect to provide for any tax whatever.

By chapter 40, page 89, of the Laws of 1891, which is compiled in the Laws of 1897 as sections 257 to

259, inclusive, the following provisions were made for taxing banks:

"Sec. 1. Persons owning shares of stock in banks, or any joint stock institution or association doing a banking business, incorporated under or by any law of the United States or of this Territory, are not required to deliver to the assessor a list thereof; but the president, cashier or other chief officer of such corporation or association shall make out and deliver to the assessor, at the time provided by law for listing property for taxation, a list of all shares of stock held therein, the actual cash value of such shares at the time, and the names of the persons holding the same, verified by the oath of such officer. The taxes assessed on such shares of stock shall be paid by the president or cashier of said corporation, and they may deduct the amount from the dividends accruing on such shares, which amount so paid shall be a lien on such shares.

Sec. 2. If the proper officer of any corporation mentioned in the preceding section, shall fail to comply with the provisions, he may be compelled to do so under the writ of mandamus, and shall forfeit to the Territory the sum of one thousand dollars, to be adjudged against him in such proceeding.

Sec. 3. All shares of stock in any such bank, joint stock institution, association, or company, shall be assessed, and the taxes thereon paid in the precinct, corporated town or city and county where such bank, joint stock institution, association, or company may be located or have its principal place of business in this Territory, and not elsewhere, whether the owner or holder of such shares resides there or not; but such shares shall not be assessed at or taxed at a greater rate than is assessed or taxed on other moneyed capital in the hands of individuals, *and*

*due allowance shall be made in assessing such shares for the value of any property of such bank, joint stock institution, association or company on which such bank, joint stock institution, association or company may be assessed or pay taxes."*

We have no fault to find with the foregoing statute. The method there provided of levying and collecting the tax against the shareholders seems to have the approval of this court and the bank made no objections on that account:

*National Bank vs. Commonwealth,* 9 *Wall,* 353;

*Merchants, etc. Bank vs. Pennsylvania,* 167 *U. S.* 461.

We call particular attention, however, to that portion of section 3 of the Territorial statute printed in italics, as it has a direct bearing on the question of the valuation of the shares of stock and the assessment of real estate belonging to the bank.

The reason for making that provision is apparent from the provisions of section 4025 of the Compiled Laws of 1897, providing for the assessment of corporations other than banks, which is as follows:

> "The property of every firm and corporation must be assessed in the county where the property is situated, and in the name of the firm or corporation. Such firm or corporation shall pay tax, and may charge the same to its partners or stockholders, according to their respective share. The owner or holder of stock in any firm or corporation, the entire capital or property of which is assessed, must not be assessed individually for such stock."

From the foregoing provisions of the Territorial

statutes, the following rules of taxation are apparent:

1. Shares of stock of the stockholders of banks are to be taxed against the shareholders, but to be assessed and collected through the agency of the bank.

2. If the real estate of a bank is assessed directly to the bank, then "due allowance shall be made in assessing" the shares of stock "for the value" of such real estate so assessed to the bank.

3. Corporations other than banks are to be assessed on the property of the corporation, and not against the shareholders.

It is clear from the foregoing that it is the policy of the Territory, in order to comply with the national banking act, to tax the *shares of stock* in case of banking corporations, and to tax the *property* in the name of the company, of all other corporations; but not to tax both shares of stock and the property of the corporations in either class.

With the law as stated above, the bank made its return as shown on page 2 of the record. Whether the real estate were separately valued and due allowance made for the value of such real estate in valuing the stock, or whether it were included with the stock at a total value for the shares of stock, would make no material difference on the question of valuation.

It is admitted on both sides that the return is irregular, but the complaint alleges (page 3 of record) that it was made in that form because of the direction of the Territorial Board of Equalization that the value of shares of stock of banks should be made upon the basis of the total capital stock and surplus, and that such returns were customary and acquiesced in by

the taxing officers.

The only change made in the return by the taxing officers was to value the capital stock, surplus and real estate (except lots 13 and 14, block 16) separately, and to add: "fixtures in Zeiger Building, $1,000"; making a total increase of $60,542.00.

As the bank made the return and the taxing officers received it without objection to its form, and as the bank paid and the treasurer received the sum of $5,224.50 conceded by the bank to be due, neither side should now be heard to raise technical objections to the form of the return:

*Albuquerque National Bank vs. Perea,* 147 *U. S.* 87.

The question, as we conceive it, is, under the allegations of the complaint admitted by the demurrer to be true, could the taxing officers lawfully assess against the shares of stock and real estate, or collect, a larger amount than the sum of $5,224.50 already paid by said bank; and if not, has not the court power to remove the cloud against the property of the bank caused by the lien of the unpaid portion of the tax assessed, and to enjoin further proceedings to reassess?

## RIGHT TO ASSESS PERSONAL PROPERTY OF BANKS.

It is clear from the foregoing that the Territory is without power to *authorize* the taxation of personal property of a national bank, and therefore the *taxing officers* can have no power to levy a tax thereon.

As a matter of fact, the Territory has not attempted to give its taxing officials any such power; yet, as shown above, a part of the taxes complained of and from which plaintiff sought to be relieved was "Fixtures in Zeiger Building" valued at $1,000, and a part of the threatened injury was the re-assessment of this identical property (record page 4).

## RIGHT TO ASSESS REAL ESTATE OF NATIONAL BANKS.

Preliminary to the discussion of this question, we deem it necessary to call attention to the opinion of the court below, found in this record, pages 18 to 21 inclusive. The court below evidently misconceived the facts and the questions raised by the record, and we should not be bound by statements for which we are not responsible.

The contention of the bank that chapter 40 of the Territorial Laws of 1891 required that if the real estate of a national bank should be assessed, such assessed value should be deducted from the value of the shares of stock of the stockholders, was clearly raised by the allegations of the complaint and fully argued in the court below. Notwithstanding this fact, however, the court below does not consider or refer to the Territorial statute under which the claim was made, but assumed that the bank contended that the National Banking Act did not permit the assessment of real estate of banks, and thereupon determined that the bank's real estate was subject to assessment because of the permission in the Act of Congress. (Record page 20.)

The *power* to tax does depend upon the provisions of the National Banking Act; but whether or not the Territory *exercised* that power, and to what extent, depends not upon the National Banking Act, but upon the provisions of the Territorial statute above quoted. It was the latter question which was raised by the pleadings, and not even referred to in the opinion of the court.

The above provision of the Territorial Act expressly provides that due allowance shall be made in assessing the shares of stock for the value of any property of such bank on which such bank may be assessed or pay taxes. *Any property* would and must include real estate, and therefore it is clear that the Territory not only did not make provision for taxing real estate of banks, but on the contrary, that there might be no doubt upon the subject, provided that if such property were assessed, due allowance should be made for the value of such property in assessing the shares of stock. Nothing could be clearer than that the intention of the Territorial Legislature was to observe the line of distinction between the shares of stock of a corporation and the property of a corporation, and not to assess both; that the general policy of the Territory in assessing taxes is to assess the property of a corporation, in the name of the corporation, but not to assess shares of stock which represent the property of the corporation; but that in order to conform to the National Banking Act it provided in case of banks for the assessment of shares of stock to the shareholders, and not to assess the property of the corporation; or, if any property of a banking corpora-

tion should be assessed, that the value thereof should be deducted from the value of the shares of stock. This construction harmonizes the provisions of the Territorial statutes above quoted, and the provisions of the National Banking Act.

The valuation of the shares of stock, without making allowance for the value of the real estate assessed against the bank, is one of the abuses complained of against the assessment already made, and another was the threatened re-assessment of said real estate against the bank, and of the shares of stock against the stockholders, without making due allowance for the value of such real estate (record page 4).

## VALUATION OF SHARES OF STOCK.

We desire to consider this question under two heads.

First, equality of taxation as to other moneyed capital,

Second, equality of taxation under the federal constitution and section 1977 Revised Statutes of the United States.

We call particular attention to the allegations of the complaint found in paragraph XI, page 5 of record, in which it is alleged that Albright, upon taking his office as assessor in the year 1903, laid down and fixed and announced as his method of valuation that all property except bank property and shares of stock in banks would be assessed upon a uniform basis of one-third of its real value; but that because of the direction of the Territorial Board of Equalization, he

would assess banks on the basis of 60 per cent. of the capital stock and surplus, in addition to the real estate of said banks, and the said plaintiff alleged that the said Albright, as assessor, did thereupon adopt and enforce as *a general rule* for valuation of property within his county the aforesaid basis of valuation, and did thereupon, for the year 1903, assess all property other than property of banks and shares of stock in banks at one-third of its real value, but assessed banks at 60 per cent. of their capital stock and surplus, and alleged in paragraph 12, page 6 of record, that the valuation contained in plaintiff's return, and on which it paid the full amount of taxes, was in excess of one-third of the value of the shares of stock of said bank, and that any additional assessment or re-assessment would be wholly in excess of the valuation fixed in the assessment of all other classes of property and would be entirely void.

The result of the adoption of this rule of taxation by the assessor of Bernalillo County was the valuation of the shares of stock and real estate claimed to be subject to taxation, at more than $60,000 in excess of what it would have been had the property been valued upon the same basis as all property other than banks.

Under our territorial statutes, all property, with a few exceptions where certain classes of property are exempted as a matter of public policy, is required to be assessed at its real value. We do not claim that the territorial laws discriminate against national banks, but on the contrary, that the taxing officers, in spite of the territorial laws that do not discriminate, in spite

of the National Banking Act forbidding discrimination as against other moneyed capital, in spite of the federal constitution and the act of Congress requiring uniformity and equality, adopted the foregoing rule, the necessary result of which was to assess bank stock at almost twice the amount, according to its real value, as was assessed upon all other classes of property.

The Supreme Court of New Mexico ignored this phase of the question entirely, and assumed that the question raised was the lack of uniformity resulting from accident or the ordinary difficulties of fixing valuations, and were sporadic, and not the result of a general rule. (Record pp. 18 and 19.)

The court also makes the following statement:

> "That the Territorial Board of Equalization had the power to fix the valuation of 60 per cent. as that at which the capital stock and surplus of banks shall be assessed has been expressly decided by this court in the case of Territory of New Mexico vs. First National Bank of Albuquerque, 10 N. M. 283, and we see no reason to make any change in or recede from the position taken by this court in deciding that case." (Record p. 19.)

The court below misapprehended the question decided in the case referred to. The question involved in that case was the power of the Territorial Board of Equalization to equalize assessments upon a class of property within the territory, such as banks, it being contended upon the part of the defendant in that case that the Territorial Board of Equalization could not equalize assessments of a class of property, but that it was confined in its action to the raising or lowering

upon a horizontal basis, of all of the property within a county, so as to adjust and equalize the taxes as between the different counties. The court, however, took the view in that case that the Territorial Board had the power to act upon a specific class of property, and that it was not exceeding its power when it equalized the assessment of banks as between themselves for that particular year at 60 per cent. of the capital stock and surplus less the value of any real estate or other property in which the capital or surplus of said bank is invested and on which taxes were separately assessed. The question of uniformity was not involved in that case, nor was it contended in that case that there had been an inequality in the assessment, the sole question being the right of the Territorial Board of Equalization to change the assessment under the circumstances shown in the record of that case.

I have called particular attention to these matters to show that the court below entirely misapprehended the nature and importance of the questions raised, and discussed questions not raised by the pleadings in this case.

## EQUALITY OF TAXATION AS TO OTHER MONEYED CAPITAL.

The section of the National Banking Act above quoted provides that taxation of shares of stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens.

The New Mexico Supreme Court states:

> "The complaint does not allege that the assessment would be at a greater percentage than is assessed upon moneyed capital in the territory. Such capital, no matter in what invested, is treated uniformly, and equally, by the Territorial Board of Equalization." (Record p. 20.)

As shown above, the allegation of the complaint was that because of the *general rule* adopted by the assessor, *all property other than shares of stock in banks* was assessed at one-third of its real value, and that the shares of stock of banks were valued upon a basis of 60 per cent. of their capital stock and surplus. "All property other than bank stock" clearly includes other moneyed capital in the hands of individuals. The allegation clearly shows that bank property is assessed almost twice as high, according to its real value, as all other property, including other moneyed capital in the hands of individuals.

In the case of Whitbeck vs. Mercantile Bank, 127 U. S. 194, the allegations of the bill were that all shares of bank stock were assessed at 65 per cent of their real value in money, while all other personal property in the City of Cleveland and County of Cuyahoga, including moneyed capital in the hands of individual citizens of said city and county, was valued at only 60 per cent. on the same basis, and this court held that the facts alleged amounted to a discrimination forbidden by the National Banking Act.

The allegations of the complaint in this case show gross discrimination against bank stock as compared with all other property, which necessarily includes money in the hands of individuals.

The cases of—

*Bank of Garnett vs. Ayers,* 160 *U. S.* 660;

*Aberdeen Bank vs. Chehalis County,* 166 *U. S.* 440;

*Bank of Commerce vs. Seattle,* 166 *U. S.* 463, and

*National Bank of Wellington vs. Chapman,* 173 *U. S.* 219,

are not in conflict with this contention. In the case last above mentioned, the rule laid down in Whitbeck vs. Mercantile Bank was distinguished and approved.

The extent and nature of the term "other moneyed capital" is shown in the case of Mercantile National Bank vs. New York, 121 U. S. 155-157, where Justice Matthews, delivering the opinion of the court, says:

> "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and re-invested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

If we are right in our construction of the pleadings in this case it will be seen that for the year 1903 shares of stock in banks were assessed eighty per cent. higher on the basis of their real value than all other moneyed capital.

It makes no difference whether the discrimination forbidden by the National Banking Act arises from a difference in the rate of assessment or from a difference in the valuation of the property, if the result is to make owners of shares of stock pay a greater tax than is imposed upon other moneyed capital in the hands of individuals, the assessment, to the extent of such discrimination, will be held illegal:

*People vs. Weaver,* 100 *U. S.* 539;
*Pelton vs. National Bank,* 101 *U. S.* 143;
*Boyer vs. Boyer,* 113 *U. S.* 695.

In the case of People vs. Weaver, on page 545, the court says:

> "This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it not be greater than *the rate assessed* upon other capital? We see that Congress had in its mind an *assessment,* a *rate* of assessment, and a *valuation;* and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital."

And in the case of Pelton vs. National Bank, the court says:

> "It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a National Bank a larger sum in proportion to their

> actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the Act of Congress."

## EQUALITY OF TAXATION UNDER FEDERAL CONSTITUTION AND ACT OF CONGRESS IN PURSUANCE THEREOF.

While the National Banking Act forbids discrimination against shares of stock in favor of other moneyed capital, the limitations of the Constitution of the United States and the Act of Congress in pursuance thereof are much broader. The 14th Amendment forbids that any state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.

The universality of this provision in the 14th Amendment is shown in an opinion of this court involving the right of an alien, in which it was said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says, 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by Sec. 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

*Yick Wo vs. Hopkins*, 118 *U. S.* 369.

It is well settled that corporations are *persons* within the provisions of the Fourteenth Amendment:

*Gulf, Colorado & Santa Fe vs. Ellis*, 165 *U. S.* 154 *and ca. ci*

It has been repeatedly held that the equal protection of the law, within the meaning of the Fourteenth Amendment, includes equality in the matter of taxation:

*County of San Mateo vs. Southern Pac. Ry. Co.*, 13 *Federal Reporter* 722-733.

*County of Santa Clara vs. Southern Pacific Ry. Co.*, 18 *Fed. Reporter* 385-397.

*Nashville, etc. R. R. Co. vs. Taylor*, 86 *Fed.* 168;

*Taylor vs. Louisville, etc. Ry. Co.*, 88 *Fed.* 350, 369-374;

*Stanley vs. Supervisors*, 121 *U. S.* 550;

*Cummings vs. National Bank*, 101 *U. S.* 153;

*Louisville Trust Co. vs. Stone*, 107 *Fed.* 305.

The case of Santa Clara County vs. Southern Pacific Ry. Company involved the right of the legislature to allow mortgages to be deducted in the valuation of real estate as to all persons except railway companies. In that case, Mr. Justice Field, delivering the opinion of the court, said:

> "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attained, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo Case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law: 'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxa-*

> *tion;* nor deny to any person within its jurisdic- the equal protection of the law *except it be by taxation.'* No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."
>
> *County of Santa Clara vs. S. P. Ry. Co.*, 18 *Fed.* 399.

In the case of Cummings vs. National Bank above cited, the precise question raised in this case was raised and decided, except that the constitutional provisions there considered were those of the State of Ohio, the case not raising the point that the discriminations there complained of were also violative of the 14th Amendment. The court there held, however, that a discrimination against national banks by assessing shares of stock at a higher rate than other property was violative of the provisions of the constitution of Ohio requiring equal taxation, and also holding that a national bank might bring suit for the protection of its stockholders, and that an injunction against so much of the tax as was illegal was the proper remedy.

I do not find any decisions of this court holding alleged discriminations in taxation violative of the 14th Amendment, but this question has been before the court on several occasions and considered:

*Ky. Ry. Tax Cases*, 115 *U. S.* 338;
*Bell's Gap Ry. vs. Penn.*, 134 *U. S.* 237;
*New York vs. Barker*, 179 *U. S.* 285.

In the case of Bell's Gap Ry. vs. Penn., above cited the court say:

> "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise":
>
> *Bell's Gap Ry. Co. vs. Penn.*, 134 *U. S.* 237.

In the case of Stanley vs. Supervisors, 121 U. S. 551, the court in an opinion by Mr. Justice Field, referring to the Cummings case, said:—

> "That decision was rendered upon a disregard by the assessing officers of a rule prescribed by the constitution of the state; but the same principle must apply when their action in assessing the shares of national banks is in disregard of the act of Congress."

And in a recent case, involving the right to the equal protection of the law, in an opinion by Mr. Justice Peckham, it is said:

> "To raise the question which the plaintiff in error seeks, it was therefore obviously necessary to allege and prove as a fact that there was habitual violation of law by undervaluation; that, in the language of Mr. Justice Miller, in Supervisors vs. Stanley, 105 U. S. 305, 318, the assessors 'habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey', undervalued real estate for assessment in New York city; or, as stated in Cummings vs. National Bank, 101 U.

S. 153, 155, that a rule or system of valuation had been adopted by those whose duty it was to make the assessment, which was designed to operate unequally and to violate a fundamental principle of the Constitution, and that such rule had been applied not solely to one individual, but to a large class of individuals or corporations."

*New York vs. Barker*, 179 *U. S.* 284.

It will be seen from the foregoing that while this court has not had a case before it in which it was decided upon the facts that it violated a provision of the Fourteenth Amendment, it has clearly pointed out what is necessary to constitute such a violation, and it is clear that there is no material difference as to the character of the discrimination necessary to condemn attacks, whether it be under the clause of the National Banking Act, preventing discrimination against other moneyed capital in the hands of individuals, or under the Fourteenth Amendment, which guarantees equal protection of the law. The conclusion upon the authorities is inevitable that where a national bank is taxed at a rate materially higher than all other property, and that discrimination is the result of a general rule, the necessary effect of which is to discriminate, it denies to said bank the equal protection of the law; and that it is immaterial in seeking the protection of the Fourteenth Amendment that the discrimination is also violative of the provision of the National Banking Act requiring equality of taxation as against other moneyed capital. It must follow as a natural result that if a national bank is discriminated against as to all other property, the discrimination is condemned by

both the provisions of the National Banking Act and the Fourteenth Amendment.

It will be observed in this case that the complaint is not directed against the provisions of the Territorial law, as we conceive them to be, but against the administration of the law. There is no provision of the law of this Territory which permits one basis of valuation as to one class of property and a different basis of valuation as to other property. Our law does not in any way conflict with the principle that taxation must be equal, because it requires all property to be assessed at its value; consequently the defendants have not even the excuse of unconstitutional law to back up their gross discriminations, but rely entirely upon the directions of the Territorial Board of Equalization, which is wholly without legislative power and acting entirely beyond its power in attempting to say how property shall be valued.

We have not considered it important to discuss the statutory powers of the taxing officers and boards of equalization, because it is evident that the territorial legislature would have no power to authorize them to discriminate against national banks, and therefore the statutory powers would be immaterial. However, we have given in an appendix to this brief an abstract of so much of the Territorial law as seems to bear directly upon the powers of said officers and Boards of Equalization.

We have not deemed it necessary to cite authorities upon the proposition that it is immaterial that our statutes require all property to be taxed upon its real value; such a statute cannot justify discrimination in

the assessment of taxes. All of the Federal authorities agree that the provision requiring assessment upon the value of the property does not justify assessing some property at its full value and other property at a fraction of its real value, or otherwise discriminating in the assessments.

It was pointed out in this brief that the return made by the bank was upon a valuation of $90,000 and that the taxes upon the basis of that return, which were paid by the bank, amounted to $5,224.50, and hence it will appear that the rate of taxation is something over 5.8 per cent. If such an excessive rate were collected upon the full value of property, it would be practically prohibitive of any legitimate business. If all property were assessed at its full value, the rate would necessarily be low, and no one would have cause for complaint; but there can be no more just cause for complaint than the fact that one class of property is assessed at its full value, while all other property is assessed at one-half of its value; or, as shown in this case, one class of property, namely, banks, is assessed at 60 per cent. of its real value, while all other property is assessed at 33 1/3 per cent. of its real value.

If there were any doubt about the application of the Fourteenth Amendment, Congress has left no doubt in acts applying to the Territory upon the question of uniformity of taxes, as will be shown by the following sections of the Revised Statutes of the United States:

> "Section 1977. All persons within the jurisdiction of the United States shall have the same

right in every state and *territory* to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject *to like* punishment, pains, penalties, taxes, licenses and exactions of every kind, *and to no other.*"

"Section 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents.'

It will be observed from the foregoing provisions that Congress has used the greatest care to exact equality in the matter of taxes in Territories, whether affecting residents or non-residents.

It is a well-settled proposition that the acts of Congress, insofar as they are applicable, have the same binding effect in Territories as a constitutional provision, and any act of a Territory in conflict therewith is void:

*Ferris vs. Higley,* 20 *Wall.,* 380;
*Bank vs. Yankton,* 101 *U. S.* 133.

## RELIEF BY INJUNCTION:

The Supreme Court of New Mexico decided that the injunction in this case was improvidently issued and should be dissolved, and ordered the case re-

versed and the complaint dismissed, and said:

> "Until the assessment is made and tax levied thereon no one is injured and suit will not lie. It may be that the officer finds other property owned by the bank which had not been returned for taxation, and if such is the case it would be manifestly improper for any court to hold that the assessor could not assess the same and enjoin him from so doing, as, until the assessment is made, no one can determine whether or not it is a proper one." (Record page 21.)

The court below ignored the allegations of the complaint that the assessment of 1903 remained undisposed of and stood as a cloud against plaintiff's real estate.

> "Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof."
>
> *Section* 4057, *Compiled Laws of N. M.* 1897.

It also ignored the prayer of the complaint that the balance claimed to be due on account of the raise and change in the assessment of the property of said bank for the year 1903 be declared illegal and void, and that the treasurer be required to cancel the same on the tax-rolls, and also ignored the following provisions of the decree:

> "It is therefore ordered, adjudged and decreed that the balance claimed to be due on account of the raise and change in the assessment of the property of said plaintiff for the year 1903 be, and the same hereby is declared illegal and void, and the defendant Frank A. Hubbell, as treasurer and ex-officio collector be and he hereby is

directed to cancel the same upon his books."

If the District Court was right in finding upon the admitted allegations of the complaint that the remaining taxes caused by the raise and change in the assessment for the year 1903 were illegal and void, and that the same ought to be canceled upon the books of the treasurer, then the judgment of the Supreme Court of New Mexico in reversing the case and ordering the complaint dismissed was clearly erroneous. We think, however, that the court was equally in error in deciding that the District Court had no power to enjoin a threatened re-assessment in view of the allegations of the complaint that the return made by the bank was intended to furnish the basis of assessment of the shares of stock and real estate of the bank subject to assessment, and was so understood and acquiesced in by the taxing officers; that the threatened re-assessment was upon the shares of stock and real estate of the bank and fixtures in the Zeiger Building, and that the threatened assessment of the shares of stock was to be arbitrarily fixed at 60 per cent. of the capital stock and surplus of the bank, without making any allowance for the separate valuation of the real estate of the bank, while all other classes of property had been assessed for that year at one-third of its real value; that this threatened assessment was alleged to be in pursuance of an order of the Territorial Board of Equalization, and without any consideration of the value of the stock.

Taking these allegations to be true, as they must be taken, under the admissions of the demurrer, there is no uncertainly as to the threatened action of the de-

fendants, either as to the property that they meant to re-assess, or as to the valuation they meant to place upon it, and the Supreme Court of the Territory was entirely in error in saying:

> "It may be that the officer finds other property owned by the bank which had not been returned for taxation, and if such is the case it would be manifestly improper for any court to hold that the assessor could not assess the same, and enjoin him from so doing, as, until the assessment is made, no one can determine whether or not it is a proper one."

The very question presented to the court by the complaint was whether or not the threatened assessment was a legal or a proper one.

If, as shown by the complaint, the bank had paid the full amount of taxes which could be legally assessed upon the shares of stock and real estate of the bank, under any theory of the case, so long as the assessment was made uniform and upon the same basis as other property in the Territory, and that the only way the taxing officers could claim an additional amount was by following *the general rule adopted for discrimination against banks* of assessing the shares of stock at 60 per cent. of their real value in money, while all other property was assessed at only one-third of its real value in money, then there could be no doubt that the threatened assessment would be illegal, and the proposition of the court below that it might be legal was wholly unwarranted.

A voluntary return for taxation, no matter how irregular, is binding upon the party; a logical sequence is that if the taxing officers approve they are

also bound by the return. It seems to us there is no escape from the proposition that a voluntary return of property for taxation, if approved by the taxing officers or modified by them as to valuation, and then as modified, approved, binds all parties, and if the modification is held to be illegal, the return stands as a legal assessment. If this be not the law, when are these questions to be considered settled? May the taxing officers who assume to say that returns for the past ten years have been irregular, go back and make re-assessments of all the property according to their own notion, or do such assessments and the payment of taxes thereon become an adjudication of these rights?

These are not merely technical questions. They involve important rights. Every person who pays taxes upon his property has a right to presume that the receipt of his taxes is security against a re-assessment. If, after a taxpayer has made a return of all his property for taxation, the taxing officers may raise his taxes, compel him to incur the expense of a review before the county commissioners and the Territorial Board of Equalization and litigation in court, and after all that the municipality may escape defeat by abandoning all their proceedings and commence over by re-assessments, there is very little protection for him. In this connection it will be remembered that the plaintiff had paid the amount conceded to be due on the old assessment.

It was contended in the court below that the plaintiff had an adequate remedy at law, but this is not in accordance with the authorities. The right to have a

cloud on real estate, caused by an illegal tax, removed, and the right to prevent threatened illegal taxes by injunction, are well established.

In the case of Pelton vs. National Bank, 101 U. S. 148, Mr. Justice Miller, speaking for the court, said:

> "To the specific remedy of injunction by suit in chancery and indeed to any remedy by the bank, many objections are raised, but as all of them have been considered and overruled in the case of Cummings vs. National Bank (infra p. 153), which was argued at the same time this case was, it is unnecessary to repeat here what is said in that case.
>
> As the complainant has paid so much of the tax as was not in violation of the act of Congress, we think the decree of the Circuit Court enjoining the collection of the remainder was right."

In the case of Cummings vs. National Bank, 101 U. S. 156, Mr. Justice Miller, again speaking for the court, says:

> "It is next suggested that since there is a plain, adequate and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.
>
> The reply is that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders—an agency created by the statute of the state. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder.

> If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws and subject itself to suit by the state. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

The following cases sustain the proposition that the court has jurisdiction to enjoin illegal taxes under the facts in this case:

*Pelton vs. National Bank*, 101 *U. S.* 143;
*Cummings vs. National Bank*, 101 *U. S.* 153;
*Hills vs. Exchange Bank*, 105 *U. S.* 319;
*San Francisco National Bank vs. Dodge*, 197 *U. S.* 75;
*Stanley vs. Supervisors of Albany*, 121 *U. S.* 550;
*U. P. Ry. vs. Cheyenne*, 113 *U. S.* 516;
*Supervisors vs. Stanley*, 105 *U. S.* 305;
*Evansville Bank vs. Briton*, 105 *U. S.* 322;
5 *Pomeroy's Eq. Jus., Sect.* 371;
*Louisville Trust Co. vs. Stone*, 107 *Fed.* 305, 46 *C. C. A.* 299;
*Taylor vs. Louisville N. R. Co.* 88 *Fed.* 350, 31 *C. C. A.* 537.

If the allegations of the complaint are to be taken as true, the bank paid all the taxes that might be assessed against the shares of stock and real estate upon any theory, and no valid re-assessment could be made.

To hold that the court might enjoin the collection

of the taxes under the threatened re-assessment, but could not enjoin the threatened re-assessment when the allegations of the complaint show clearly what that threatened re-assessment would be, is a paradox in legal procedure. Under the allegations of the complaint there was no uncertainty as to the nature and extent of the threatened re-assessment; if made as threatened, it would be wholly illegal. The bank had a right not only to have the existing taxes canceled, but also to have the threatened repetition of said illegal assessment enjoined. The fallacy in the opinion of the court below was in assuming that the assessor and collector had legal right to make the threatened re-assessment. If the threatened re-assessment would be illegal and void, then they had no legal right to make it. It would be a remarkable perversion of the principles of equity to say that a threatened injury may not be enjoined in the beginning, but that we must sit idly by until a part of the injury has been committed before equity will interpose its preventive relief by injunction.

When the officers of the Territory admit that there has been systematic discrimination in the assessment of shares of bank stock at 60 per cent. of the real value, while all other property is assessed at only one-third of its real value, we submit there should be no hesitancy in condemning such discriminations as violative not only of the provisions of the National Banking Act relative to other moneyed capital, but also the provisions of the Fourteenth Amendment providing for the equal protection of the law, and also of the act of Congress that all persons shall be subject to

like taxes, licenses and exactions of every kind and no other.

We submit that the judgment of the Supreme Court of New Mexico should be reversed and that the judgment of the District Court should be affirmed.

ALONZO B. McMILLEN,
*Attorney for Appellant.*

# APPENDIX.

## ABSTRACT OF LAWS RELATIVE TO ASSESSMENT OF TAXES.

It is the duty of the assessor, between the 1st day of March and the 1st day of May in each year, to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, and exact from each person a statement in writing showing all property liable to taxation and its value, and require the same to be sworn to, etc.

Section 4032, Compiled Laws 1897.

If the assessor finds a list incorrect as to amount or value he can change the same, but must notify the party interested of such change.

Section 4039, Compiled Laws of 1897.

Any person dissatisfied with the action of the assessor may appeal to the Board of County Commissioners.

Section 4047, Compiled Laws of 1897.

The County Commissioners of each county shall constitute a board of equalization for the revision, correction and completion of the assessment rolls. In case any material change is made by the board, the party interested is entitled to notice. From the action of this board any person interested may appeal to the Territorial Board of Equalization by filing a written notice of appeal within five days from the date of the decision of the board.

Section 4048, Compiled Laws of 1897.

Taxes levied according to the provisions of the law are to have the force and effect of judgments against the person assessed, and taxes upon real estate are made a lien thereon from the date of the levy.

Section 4057, Compiled Laws 1897.

The Territorial Board of Equalization is given original jurisdiction to assess the property of railroad, telegraph, telephone and sleeping-car companies, and is forbidden to fix a minimum or maximum value to be placed on any kind or class of property, and provides that all property must be assessed at its actual value only, and all acts fixing a minimum or maximum value on any kind or class of property is declared void.

Section 2635, Compiled Laws of 1897.

The said Territorial Board of Equalization is required to meet annually, on the second Monday of September, as a board of equalization and appeal only, and is required to adjust and equalize the assessment rolls by raising or lowering the valuation thereof, so that the same shall be of uniform value throughout the Territory, and is also required to hear appeals from the several counties.

Section 2636, Compiled Laws of 1897.

By chapter 103 of the Laws of 1907, approved March 21st, 1907, said section 2635 was amended so as to add "shares of stock in all national banks and other banking institutions," to the list of properties which the Territorial Board of Equalization is to

value, and also amended section 257 cited in the brief as to method of making returns, etc., by banks; and said act expressly provides that no corporation doing a banking business shall be assessed upon or liable in any way to pay any taxes upon any property of any kind or character owned by it, but the taxes provided by law to be levied upon the shares of stock of such corporation shall be in lieu of any taxes which might otherwise be assessed upon its property.

Chapter 103, Laws of 1907.

BRIEF FOR APPELLEES.

# Supreme Court of the United States

OCTOBER TERM, 1907.

No. 138

FIRST NATIONAL BANK OF ALBUQUERQUE,
*Appellant.*

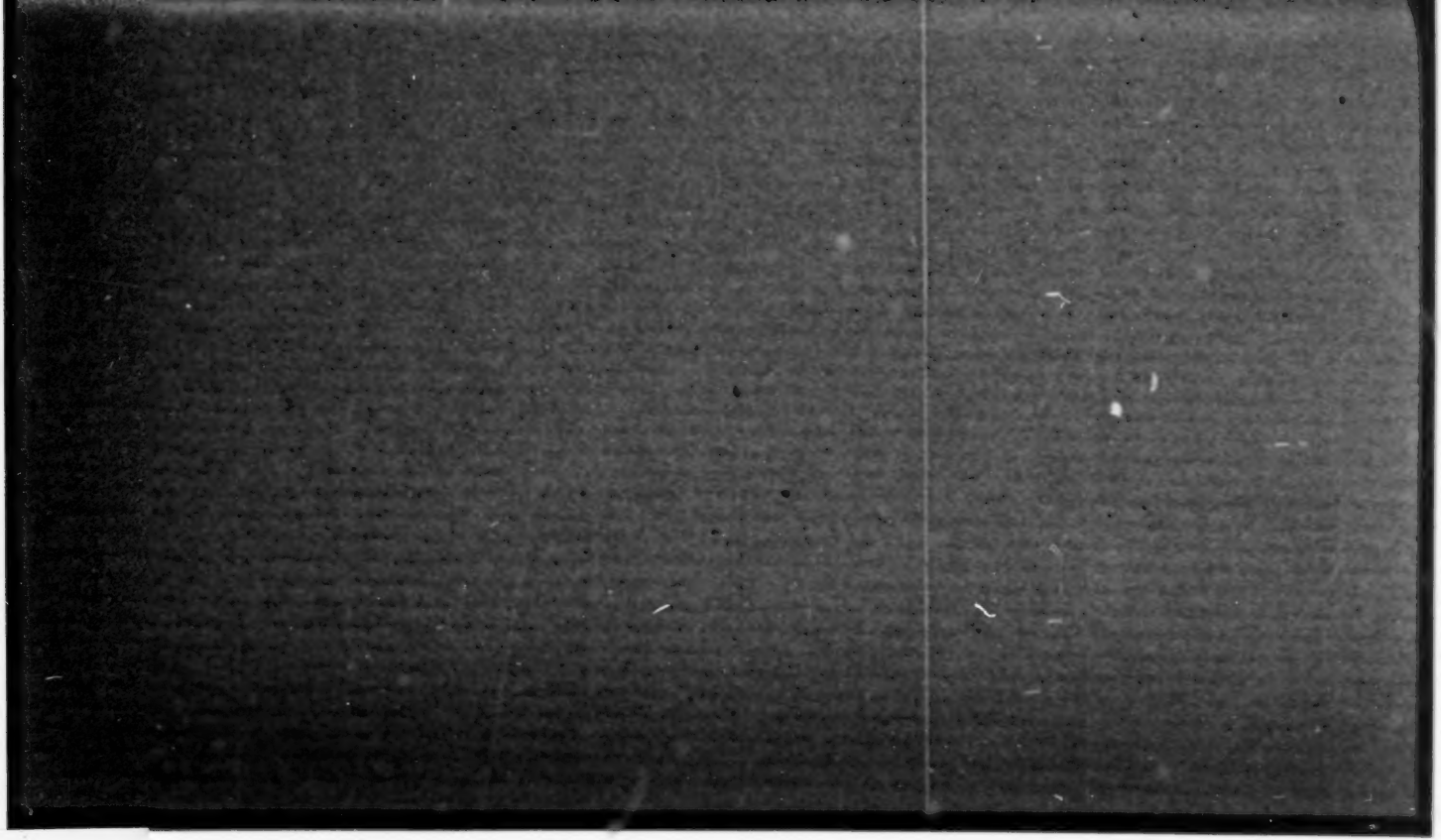
*vs.*

GEORGE F. ALBRIGHT, ET AL.

APPEAL FROM NEW MEXICO.

FRANK W. CLANCY,
*Attorney for Appellees.*

MORNING JOURNAL, ALBUQUERQUE, N. M.



# Supreme Court of the United States

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FIRST NATIONAL BANK OF ALBUQUERQUE,
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GEORGE F. ALBRIGHT, ET AL.

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APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

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## STATEMENT OF THE CASE.

This is an action in the nature of a suit in in equity, begun in the District Court of Bernalillo County. The complaint alleges that the defendant, Albright, is the assessor, the defendant, Hubbell, the treasurer and ex-officio collector, and the defendant, Clancy, the district attorney, for said county. It is further alleged that the plaintiff made a return of its property for purposes of taxation, which return is set out on page 2 of the record. It will be seen that there is no list of stockholders given, nor the value of the shares of stock, nor the value of any particular piece of property, but "capital stock, surplus and real estate" are

lumped together, and a total value fixed of ninety thousand dollars.

The complaint further alleges that on June 2, 1903, defendant, Albright, raised and changed the assessment of plaintiff, as set out on pages two and three of the record. This assessment as made by Albright, like the return made by plaintiff, is objectionable because it fails to set out a list of the shareholders and the amount of stock held by them, thus violating the rule repeatedly laid down by the federal courts that the stock of a national bank cannot be assessed *in solido*.

The seventh subdivision of the complaint alleges a variety of matters seeking to excuse the deficiency in the return made by plaintiff, and setting out appeals from the assessment made by Albright to the board of county commissioners and to the territorial board of equalization, but, as the attempt to collect anything under Albright's assessment had been abandoned, these matters do not seem material or important. The complaint in its ninth subdivision, alleges the bringing of a suit by the district attorney for the recovery of taxes based upon the assessment made by Albright, and that plaintiff interposed a demurrer, in consequence of which the district attorney dismissed the case and stated that he would cause the assessor or collector to re-assess the property of plaintiff. It is obvious that such re-assessment was proposed and was necessary, because, in view of the decisions above referred to, no valid assessment had been made upon which the questions arising between the territory and plaintiff could be adjudicated.

The complaint further sets up the alleged injustice of valuing bank stock upon a different basis from the valuation fixed upon other property by the assessor, it being alleged that other property is assessed on a basis of one-third of its real value, while the territorial board of equalization has directed the assessments of all bank stock on a basis of sixty per cent. of its par value. There is no allegation anywhere in the complaint as to what is the real value of the shares of stock in the plaintiff bank.

The complaint prays for an injunction to prevent any further or additional assessment of plaintiff or its shares of stock for the year 1903, and that the change in the assessment made by Albright be declared illegal and void, and the defendant Hubbell directed to cancel the same upon his books.

To this complaint a demurrer was interposed as to which it can be said, without attempting here to repeat its language, that every objection to the validity of the complaint which will be argued in this court, was definitely and distinctly set forth.

The district court overruled the demurrer, and defendants declining to plead further, the court decreed that the balance claimed to be due on account of the Albright assessment, was illegal and void and the defendant Hubbell was directed to cancel the same upon his books, and the defendants Albright and Hubbell were both enjoined from re-assessing or making additional assessments on any property of said bank or its shares of stock for the year 1903.

From this judgment the defendants took an appeal to the supreme court of the Territory, and that court

reversed the judgment and remanded the cause with directions to dismiss the complaint. From this judgment, plaintiff has appealed to this court.

It is to be noted that no question was made concerning the action of the district court as to the Albright assessment. That assessment was always admitted to be incorrect, its incorrectness being the sole reason for the proposed re-assessment. But it is no more deficient or incorrect than the return made by plaintiff and really not as much so, because it does itemize the different properties of plaintiff giving a value to each, instead of lumping capital stock, surplus and real estate under a single valuation, as plaintiff undertook to do.

Appellees insist that no case is made by the complaint to invoke the equitable jurisdiction of the court, as will be shown under the Fifth point of this Brief; but we will first discuss the case as though the propositions presented might be determined in this proceeding.

## POINTS AND AUTHORITIES.

### FIRST.

### Plaintiff's return was insufficient as a basis of assessment.

Section 257 of the Compiled Laws of New Mexico of 1897, reads as follows:

> Persons owning shares of stock in banks, or any joint institution or association doing a bank-

ing business, incorporated under or by any law of the United States or of this territory, are not required to deliver to the assessor a list thereof; but the president, cashier or other chief officer of such corporation or association shall make out and deliver to the assessor, at the time provided by law for listing property for taxation, a list of all shares of stock held therein, the actual cash value of such shares at the time, and the names of the persons holding the same, verified by the oath of such officer. The taxes assessed on such shares of stock, shall be paid by the president or cashier of said corporation, and they may deduct the amount from the dividends accruing on such shares, which amount so paid shall be a lien on such shares.

An examination of the return made by plaintiff will show that it makes not the slightest pretence at meeting these requirements. It contains no list of the shares of stock; it contains no statement of the actual cash value of such shares, nor does it give a single name of any person holding such shares, and it does not give the value of any item of property mentioned. It was obviously impossible for the assessor to make any lawful assessment based upon this return, and he very properly disregarded it and proceeded to make an assessment of the property of plaintiff, which was at least an improvement upon what was set out in plaintiff's return.

*Bank vs. Bailey*, 39 *Pac.*, 84.

SECOND.

## The Albright assessment was not valid.

The defect in the Albright assessment is that it assesses the two hundred thousand dollars of capital of

the bank in one body, as one item, which is not authorized by either the territorial or federal statute. Citation of authorities can hardly be necessary in support of this proposition, as it is not believed that it will be disputed.

*Owensboro Bank vs. Owensboro,* 173 *U. S.,* ~~680~~ 679.

*National Bank vs. Stone,* 174 *U. S.,* 434.

In other respects, the Albright assessment is correctly made, as it specifies and gives a distinct value to each separate piece of property.

THIRD.

**There being no valid assessment, it was the duty of the assessor or collector to make one.**

The authority for making additional assessments is to be found in sections 4055 and 4056 of the Compiled Laws of 1899. Those sections authorize the assessor or the collector to make what are called additional assessments of any property "omitted in the assessment" or "omitted from the tax list," and upon this language plaintiff, in the present case, appears to predicate some claim, because in the complaint it is asserted that the assessor or collector intends to make a new assessment "without disposing of the prior assessment."

The sections referred to are as follows:

> Sec. 4055: If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same

is returned to the board of county commissioners, with all arrearages of taxes, which should have been assessed and paid in former years, charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

Sec. 4056: When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value, and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list, following the entries made by the clerk, and such entries shall be designated as, Additional assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

Our position is that whenever property is defectively or erroneously assessed, it falls under the provisions of the sections of the Compiled Laws above quoted, and the property is to be treated as "omitted in the assessment." Exactly the same objection to such additional assessments was made in other cases from New Mexico, but the court paid no attention to it.

*New Mexico vs. U. S. Trust Co.*, 174 *U. S.*, 549-51.

*U. S. Trust Co. vs. New Mexico,* 183 *U. S.,* 539, 541.
*U. S. Trust Co. vs. Territory,* 10 *N. M.,* 421-2.

In the first of these decisions, the court clearly considered the original assessments and the additional assessments made by the collector, which additional assessment distinctly recited that the property was "omitted in the assessment" of previous years, although it appeared that the original assessments attempted to enumerate and assess the same property which was better described in the additional assessments.

It must be assumed, although it is not distinctly alleged in the complaint, that the object of the proposed additional assessment is to assess the shares of stock as required by section 257 of the Compiled Laws of 1897, which section is undoubtedly in conformity with the law of the United States and the decisions of this court.

*Bank vs. Commonwealth,* 9 *Wall.,* 359-60.
*Bank vs. Commonwealth,* 167 *U. S.* 465.

FOURTH.

**The proposed assessment is unobjectionable as far as plaintiff is concerned.**

The complaint sets up as objections to the proposed additional assessment that it is intended to value the shares of stock at sixty per cent. of their face value and the surplus fund at sixty per cent., without deducting

from the value of the stock the assessed value of the real estate of plaintiff; that the personal property of the bank is not subjecto taxation; that if the real estate should be assessed separately, its assessed value should be deducted from the value of the stock; that the stock cannot be legally assessed at a higher rate than other property in the territory; that any additional assessment would be in excess of the valuation of all other classes of property, and would be entirely void; that the valuation of all property must be upon a uniform basis, and that, under the provisions of the national banking act, plaintiff cannot be taxed except upon its shares of stock and real estate, and then only upon the general basis of other property in the territory.

Without considering each of these objections specifically, it will be more convenient to meet them by the demonstration of the validity of the proposed assessment, which will be considered under several subheads.

A.

*It is clearly less than the territorial statute requires.*

It is evident, from a consideration of the statutes of New Mexico, that the intention of the law is that all property shall be assessed at its actual cash value, and this is especially true as to shares of bank stock, as is apparent from section 257 of the Compiled Laws hereinbefore quoted. The objection urged that in actual practice the assessor has adopted a different basis for the valuation of other kinds of property than

that which is adopted for the valuation of bank stock, is of no force or validity. It is nowhere alleged in the complaint what is the actual value of the shares of stock of the bank. The nearest approach to anything of that kind in the complaint, is the averment that if the same rule of valuation were adopted for plaintiff as for other property, the total valuation would not exceed $74,878.00, but it does not appear whether this refers to the value of the shares of stock alone, or of the stock and surplus, or to their value with the value of the real estate added. It is quite certain, however, that the stock of the bank must be actually worth more than par, while the proposed assessment is only sixty per cent. of its par value. That we are correct in our position, is supported by authority. In another national bank case, which came from New Mexico to this court, the bill of complaint alleged that the bank made a return of its property to the assessor, with a protest that its property should not be assessed at any greater rate than other property, but that the assessor assessed the property at its par and full value, and, upon appeal to the board of equalization, the assessment was reduced to 85 per cent. The bill further alleged that all other property was not assessed at near so high a valuation upon its actual value, and that the actual valuation of such other property did not exceed 70 per cent. of its actual value. The court stated that the law of New Mexico required property to be assessed at its cash value, and that the plaintiff's property was assessed at 15 per cent. below that value and that the mere fact that other property happened to be assessed at 30 per cent.

below its value, was not sufficient to entitle plaintiff to relief.

*Bank vs. Perea*, 147 *U. S.*, 88-89.

The mere fact that other property is assessed at a smaller percentage of its real value than the property of this plaintiff or any other special class of property, is not sufficient to invalidate the higher assessment. Any such rule of decision would be destructive of our whole system of taxation. The moment that we begin to make comparisons between one class of property and another as to their general values for purposes of taxation, we will find numerous inequalities, but they cannot be considered as sufficient to destroy the validity of the higher assessments of some kinds of property. The proposition contended for by plaintiff is very different from what it would be if our assessing officers attempted to perform their duty under the law by assessing all property at its actual cash value, and plaintiff were complaining that its property was assessed at more than its cash value. Plaintiff admits that the proposed assessment is for much less than the law requires, but urges that other kinds of property will receive still greater favors of the same kind in the way of illegal under-valuation, and that, therefore, the proposed assessment would be entirely void. This cannot be maintained.

*Nickerson vs. Kimball*, 1 *N. B. C.*, 409.
*Wagner vs. Loomis*, 37 *Ohio St.*, 580-1.
*Carroll vs. Alsup*, 64 *S. W. Rep.*, 199-200.

To make the valuation of one class of property depend upon the extent of the violation by assessors of the duty required of them by law in

respect to another description of taxable property, would be a recognition and sanction of such violations of duty, which we should not impute to the legislature unless declared in the most unequivocal terms.

*People vs. Supervisors*, 60 *N. Y.*, 385.

B.

*It makes no discrimination against national banks.*

It is set up in the complaint that under the provisions of the national banking act the plaintiff can be taxed "only on the general basis as other property within said territory is assessed." (Page 6 of Record.) There is nothing in the national banking act to sustain this ground of complaint.

National banks are taxable only by permission of Congress. That permission will be found in section 5219 of the Revised Statutes of the United States, which authorizes the taxation of the shares of stock subject only to two restrictions, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere." In the present case, there is not a hint in the complaint that the proposed action of defendants in any way conflicts with this act of Congress. It is not suggested that the assessment would be at a greater rate than is assessed upon other moneyed capital in the territory. Moneyed capital in New Mexico, whether invested in

national bank shares, or otherwise, is treated uniformly and equally by the territorial board of equalization and by the assessing officers.

It has been distinctly held in so many words by the supreme court of the United States that the restriction imposed by Congress "is equality of assessment with other moneyed capital; not with other property generally, but with that property which passes under the description of moneyed capital."

*Talbot vs. Silver Bow*, 139 *U. S.*, 447.

*Mercantile Bank vs. New York*, 121 *U. S.*, 155.

This court has distinctly shown what would be a violation of this law.

*Pelton vs. Banks*, 101 *U. S.*, 146.

It is not alleged by complainant in its complaint that there is any other moneyed capital in New Mexico in favor of which there is any discrimination against national banks. Taking the complaint most strongly against the pleader, we must conclude that there is no such discrimination, especially when it is alleged by the pleader that all banks, national or other, are treated alike. There is an attempt in the complaint and in appellant's brief to lead the court to believe that there is such discrimination, from the allegation in the complaint, that other property is assessed at one-third of its real value, and the assertion in the brief that such other property must necessarily include "other moneyed capital" in the hands of individuals; but this assumes the fact of the existence of such "other moneyed capital" as defined by this court,—a fact not alleged in the complaint. A comparison with the alle-

gations of the bill of complaint in another case, decided in this court, and a consideration of what this court held, will show that there is no foundation for appellant's contention.

*Bank vs. Chehalis County*, 166 *U. S.*, 461-2.

C.

*It involves no denial of the equal protection of the laws.*

Appellant's counsel, in his brief, attempts to lead the court to believe that in consequence of a systematic under-valuation of property other than that of banks, there is such discrimination against banks as to amount to a denial of the equal protection of the laws which is guaranteed by the 14th amendment to the Constitution. In support of this contention, it is asserted in that brief, in substance, that while other property was systematically assessed at one-third of its value, the stock in banks was assessed at sixty per cent. of its real value. This is distinctly stated in so many words on page 33 of that brief, but there is no such allegation in the complaint. The complaint sets up that the assessor systematically assessed property generally at one-third of its real value, and that the assessment of banks is made on the basis of sixty per cent. of the par value of the stock, and upon this allegation rests the entire argument that there is any discrimination between the assessment of banks and the assessment of other property. It is nowhere asserted in the complaint that the real value of appellant's stock is the same as its par value, nor any statement as to what

its real value is, the nearest approach to anything of that kind being the allegation that the valuation contained in its return is in excess of one-third of the value of the shares of stock. This is certainly not good pleading, and furnishes no criterion by which to ascertain whether appellant's stock is being assessed too high or not, in comparison with other property.

Even if it were made to appear, however, that this particular bank, in comparison with other property in the same county, is not fairly assessed, that in itself would not be sufficient to justify the claim of a denial of the equal protection of the laws. The utmost that could be claimed upon such a complaint as the one here made, would be that, as an incident to a general system adopted for the assessment of all banks, this particular bank was assessed too high. This certainly could not be sufficient.

*Bell's Gap R. R. Co. vs. Pennsylvania*, 134 *U. S.*, 237;

*Merchant's Bank vs. Pennsylvania*, 167 *U. S.*, 464;

*New York vs. Barker*, 179 *U. S.*, 286.

It must be apparent from the allegations of the complaint, that the Territorial Board of Equalization, in an effort to secure a simple and definite mode of assessment of banks, which would, on an average, be fair and just to them and to all other tax-payers, advised and directed assessors to assess all bank stock at sixty per cent. of its par value. It is apparent that by this method, necessarily some banks would be assessed at what is really a higher valuation than others.

The stock of all banks is not of uniform value. The stock of one may be worth a very large premium, as must be the case with the stock of appellant, judging from what little information the complaint gives on that point, while the stock of other banks might be worth even less than par. Such inequality as there may be by such a system as this, is between the different members of the same class, and not as between that class and other classes of tax-payers. For all that appears in this complaint, an assessment of the stock of all banks in New Mexico at sixty per cent. of the par value, may result in an assessment of even less than one-third of the actual value, and the mere incidental injustice to one particular bank in consequence of the application of a general system of this kind, is not sufficient to invoke the assistance of the courts in securing the equal protection of the laws provided for in the 14th amendment.

*Michigan C. R. Co. vs. Powers*, 201 *U. S.*, 293.

D.

*Congress has specifically authorized the taxation of real estate of national banks.*

Plaintiff complains of the intention of defendants to assess its real estate, and claims that the real estate is included in the valuation of the shares of stock, or should be deducted from that valuation if assessed at all. The last sentence of section 5219 of the U. S. Revised Statutes, declares that "nothing herein shall be construed to exempt the real property of associations from, either state, county or municipal taxes, to

the same extent, according to its value, as any other real property is taxed."

Plaintiff does not suggest that there is any intention to assess its real estate at any higher rate than the valuation fixed upon other real estate, but its claim seems to be that the real estate ought not to be taxed at all, because it goes to make up the value of the shares of stock, in part, at least, and that to assess the shares of stock at their full value and also the real estate, would be double taxation. Two things naturally occur to the mind in answer to this, one being that the shares of stock are not assessed at their full value, and the other that there is nothing in our organic law or local legislation which forbids double taxation, if this could be considered such.

*Davidson vs. New Orleans*, 96 *U. S.*, 106.
*Tennessee vs. Whitworth*, 117 *U. S.*, 136-7.
*New Orleans vs. Houston*, 119 *U. S.*, 277-8.

That this objection by plaintiff is not well taken, will be apparent from an examination of a comparatively recent decision of this court and of earlier cases therein cited, from which quotations are therein made, from which it is perfectly plain that there is no equivalency between the assessment of the property of the bank and the assessment of the shares in the names of the shareholders.

*Bank vs. Owensboro*, 173 *U. S.*, 676 *et seq.*

If it were true that the value of the real estate of national banks must be deducted from the value of the shares of stock, because it forms a part of the value of

those shares, it would be equally true that the value of any other investment in any other property should be treated in the same way as forming a part of the value of the shares, and if the investment were in exempt property, the shares of stock would *pro tanto* be exempt; but this is otherwise decided. A "tax on the shares is not a tax on the capital of the bank."

*Bank Tax Cases,* 3 *Wall.,* 582-3-4.

*Palmer vs. McMahon,* 133 *U. S.,* 666 *et seq., and cases cited.*

Plaintiff's contention would nullify the Congressional intent that the shares and the real estate shall both be taxed.

Plaintiff appears to rely, however, on section 259 of the Compiled Laws of New Mexico, which is as follows:

> All shares of stock in any such bank, joint stock institution, association or company, shall be assessed, and the taxes thereon paid in the precinct, corporated town or city and county where such bank, joint stock institution, association or company may be located or have its principal place of business in this territory, and not elsewhere, whether the owner or holder of such shares resides there or not; but such shares shall not be assessed at or taxed at a greater rate than is assessed or taxed on other moneyed capital in the hands of individuals, and due allowance shall be made in assessing such shares for the value of any property of such bank, joint stock institution, association or company on which such bank, joint stock institution, association or company may be assessed or pay taxes.

This does not say that the value of other property

assessed must be deducted from the value of the shares of stock, but that "due allowance shall be made" for the value of such other property. Can it be said, when the shares of stock of plaintiff are clearly assessed far below their actual value, that "due allowance," whatever that means, has not been made for the value of its real estate? Or that, in adopting a general system of assessing stock of all banks at 60 per cent. of its par value and at the same time assessing real estate of banks, "due allowance" has not been made for the value of such real estate?

E.

*No personal property of plaintiff is sought to be assessed.*

In paragraph 9 of the complaint, it is stated that the district attorney will cause the assessor or collector to re-assess, among other things, "all of the personal property above described," but no personal property can be found described any where in the complaint, and this must be taken as a mistake of the pleader, unless he refers to the shares of stock and the surplus. It cannot be seriously contended that the shares of stock and the surplus are not taxable, and we can only conjecture that the complaint in this particular may make reference to the item of "Fixtures in Zeiger Buildings," which is mentioned on page 4 of the complaint as part of the Albright assessment. It has been some times held that things called "fixtures" were personal property, but as a general rule fixtures are to be considered as a part of the realty.

3 *Words & Phrases*, 2832.

F.

*The law does not require all property to be assessed upon a uniform basis.*

It is asserted in the complaint "that under the provisions of law of the Territory of New Mexico, the valuation of all property subject to assessment, without regard to its kind or character, is required to be assessed upon a uniform basis." There is no such provision to be found in the statutes of New Mexico. The only approach to it is the general intent that all property should be assessed at its actual cash value. Plaintiff's trouble is that while it would, by the proposed assessment, be unlawfully getting its shares of stock assessed at less than the law requires, some other kinds of property are getting even greater illegal reductions in the amount of their valuation. As we have heretofore seen, this is no valid ground of complaint.

In many states there are constitutional provisions as to uniformity and equality of taxation. We have nothing of the sort in our organic law. Our legislature is supreme and unlimited as to taxation, except that we must not tax non-residents at a higher rate than our own people; we cannot pass local or special laws for the assessment and collection of taxes, and we cannot tax Pueblo Indians. Also, of course, we are subject to the restrictions in section 5219, U. S. Revised Stautes, as to taxing shares of stock in national banks.

It is obvious that the numerous decisions as to violations of the uniformity rule under state constitutions can have no application here. Discrimination is

not forbidden except as stated in the last paragraph.

> Perfect equality and perfect uniformity of taxation as regards individual or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised, must when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded.
>
> *State Railroad Cases*, 92 *U. S.*, 612.

FIFTH.

## No case of equitable jurisdiction is presented.

Thus far the case has been treated as though it were one proper for the consideration of a court of equity, and the various propositions involved have been discussed as though they might be determined in this proceeding; but it must have struck the court, in the course of that discussion, that this is an unusual and extraordinary case, the like of which no member of the court ever saw before or is likely to see again. We now take the position that there is nothing set up in the complaint which calls for the interposition of a court of equity or which makes a case of equitable

jurisdiction. This is also the position of the supreme court of New Mexico, as will appear by reference to the closing paragraphs of its opinion on page 21 of the Record.

The jurisdiction of equity to enjoin the collection of an illegal tax at the suit of an injured taxpayer, is well established, but never before have we had a case of an attempt to enjoin the assessing officers from laying a foundation for a tax. If this practice is to be tolerated, there is no reason why a taxpayer may not, prior to the time when it becomes the duty of the assessor to make assessments, proceed to enjoin him from making any particular proposed assessment of the property of the complaining taxpayer, and in advance of being assessed at all, in advance of being called upon to pay anything, go on to litigate the method and amount of the assessment.

Counsel will gravely say to the court, if it is possible to enjoin the collection of an illegal tax, why may we not go a step further back and enjoin the making of an illegal assessment which would make the tax thereon illegal? And they will say to themselves, with even more seriousness, "if, perchance the court holds against us on this proposition, after going to all the appellate courts possible, we can come back and resist the collection of the tax, and travel the same route all over again before our client parts with his money." This reverses the rule about preventing a multiplicity of suits, and promotes the chance of such multiplicity.

It is clear that there has never been any valid assessment of the plaintiff's shares of stock. It must not be forgotten that the irregular, defective and illegal

return made by plaintiff, was not an assessment. The assessor took the view that it would not serve his purpose, and attempted to make an assessment, which was fatally defective in one particular, as to the way the shares of stock should be assessed. When suit is brought upon that assessment, the territory is forced out of court on account of that defect. An additional assessment is proposed in order to remedy that defect, and plaintiff asks a court of equity to prevent the remedying of that defect which is absolutely necessary in order to get the controversy between the parties in shape for decision.

He who comes into a court of equity must come with clean hands. The plaintiff in this case committed the first error. It made a return to the assessor, in which it neglected and failed to specify the number of its shares of stock or the names of the shareholders and the amount each one held. The assessor by this would be naturally led to believe that the plaintiff desired and intended to have its shares of stock assessed as a whole and would acquiesce in that form of assessment, and he proceeded accordingly. When suit is brought on the assessment made by him, thus misled by plaintiff, a dismissal is forced on account of the defective character of the assessment. It cannot be contended with even a show of plausibility, that the plaintiff can in this action be allowed to have an injunction to prevent the assessor or collector from making the assessment as the assessor ought originally to have made it. There is no doubt that under the law the return made by plaintiff could not possibly form a proper basis of assessment, or that it was the duty of the assessor to cor-

rect it, especially in the most important point of the assessment of the shares of stock, as well as in the valuation of each piece of property enumerated. He made an attempt to make a good assessment, but failed in one particular, misled by the previous action of plaintiff. Is plaintiff now in any position to prevent a correct and proper assessment from being made?

It is respectfully submitted that the judgment of the supreme court of New Mexico should be affirmed.

FRANK W. CLANCY,
*Attorney for Appellees.*

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States

OCTOBER TERM, 1907.

No. 123.

FIRST NATIONAL BANK OF ALBUQUERQUE,

*Appellant,*

vs.

GEORGE F. ALBRIGHT, FRANK A. HUBBELL AND F. W. CLANCY,

*Appellees.*

No. 20399.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

BRIEF OF APPELLANT IN REPLY TO BRIEF OF APPELLEE.

ALBERT B. McMILLEN,
Attorney for Appellant.

# Supreme Court of the United States

OCTOBER TERM, 1907.

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FIRST NATIONAL BANK OF ALBUQUERQUE,

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*Appellees.*

No. 20399.

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## BRIEF OF APPELLANT IN REPLY TO BRIEF OF APPELLEE.

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### I.

It seems to us that counsel for appellees does not meet the case presented by appellant. At the close of the statement of facts, page 4, counsel for appellee makes the following statement:

"It is to be noted that no question was made

> concerning the action of the district court as to the Albright assessment. That assessment was always admitted to be incorrect, its incorrectness being the sole reason for the proposed re-assessment. But it is no more deficient or incorrect than the return made by plaintiff and really not as much so, because it does itemize the different properties of plaintiff giving a value to each, instead of lumping capital stock, surplus and real estate under a single valuation, as plaintiff undertook to do."

It is difficult to understand the purpose of the paragraph in question, unless it is to avoid the effect of appellant's brief as to the provisions of the decree found at page 9 of record, as follows:

> "It is therefore ordered, adjudged and decreed that the balance claimed to be due on account of the raise and change in the assessment of the property of said plaintiff for the year 1903 be, and the same hereby is declared illegal and void, and the defendant, Frank A. Hubbell, as Treasurer and Ex-Officio Collector be, and he hereby is directed to cancel the same upon his books."

The fact remains, as pointed out in appellant's brief, that the facts alleged by appellant were admitted and challenged by the demurrer, and the district court, upon said admitted facts, declared the tax illegal, and ordered the same to be canceled upon the books of the treasurer; but notwithstanding this state of facts, the Supreme Court of the Territory reversed the cause and directed the complaint to be dismissed.

The statement of counsel that no question is made concerning the action of the District Court as to the

Albright assessment cannot change the facts shown by the record, or be allowed to contradict it.

II.

Under points 1, 2 and 3 made by counsel for appellees, on pages 4, 5 and 6, he lays great stress upon the irregularity of the return of plaintiff and the action of the assessor Albright in changing the assessment, notwithstanding the complaint and appellant's brief admit the irregularity of the return and assessment, but counsel for appellees ignores the fact that this return of the bank and assessment by Albright was never challenged on account of irregularities, but solely on account of discrimination against said bank; and he ignores the fact that relying upon that return and the assessment by Albright, the appellant paid the taxing officers the sum of $5,224.50, being the amount, according to its return, and charged the same to its stockholders, as shown by paragraph 8, page 4 of record; and also ignores the point made by the complaint that said sum was in excess of the amount that could be legally taxed against appellant upon any theory. The complaint shows, indeed, that the questions raised before the boards of equalization were on account of discrimination and not for irregularity of return or assessment. Record, p. 3.

III.

Under the fourth point of appellant's brief, pages 8 to 12, he makes the point that the assessment is unobjectionable as far as plaintiff is concerned, because it is clearly less than the Territorial statute requires.

This is upon the theory that because under the laws of New Mexico assessments are directed to be made at the cash value, that no one can complain of discrimination, no difference how unjust, so long as he is not assessed at more than the cash value of his property. The statement of this contention is sufficient to condemn it. He cites the case of Bank vs. Perea, 147 U. S., 88, which was a case arising in this Territory, as authority for his proposition. He ignores entirely the allegation of the complaint that this discrimination was the result of a settled policy upon the part of the assessor, as shown by allegations in paragraph XI., page 5 of record. As a matter of fact, this court, in the Perea case, clearly recognized the distinctions that we make in this case. In the opinion delivered by Mr. Justice Brewer, the court said:

> "The law of New Mexico requires property to be assessed at its cash value. Confessedly, this plaintiff's property was assessed at fifteen per cent. below that value. Surely, upon the mere fact that other property happened to be assessed at thirty per cent. below the value, *when this did not come from any design or systematic effort on the part of the county officials*, and when the plaintiff has had a hearing as to the correct valuation, on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way."
>
> *Bank vs. Perea,* 147 *U. S.*, 89.

Counsel for appellee states, on page 11: "The proposition contended for by plaintiff is very different from what it would be if our assessing officers at-

tempted to perform their duty under the law by assessing all property at its actual cash value and plaintiffs were complaining that its property was assessed at more than its cash value." As a matter of fact, cases seldom, if ever, arise in which such a state of facts is involved. Probably no state provides for the assessment of property at less than its cash value; yet the practice is almost uniform to assess at something less than the cash value. In the case of Whitbeck vs. Mercantile National Bank, 127 U. S., 193, which arose under the taxing laws of Ohio requiring property to be assessed at its cash value, the assessment was condemned because the shares of stock of that bank were assessed at 65 per cent. of their cash value, while all other moneyed capital was assessed at only 60 per cent. All the cases cited in our brief arose under laws requiring assessment at cash value, while the assessments complained of were less than the cash value.

IV.

On page 12, counsel for appellee makes this statement, which is misleading: "It is set up in the complaint that under the provisions of the National Banking Act the plaintiff can be taxed only on the general basis as other property within said Territory is assessed (page 6 of record). There is nothing in the National Banking Act to sustain this ground of complaint." Referring to page 6 of the record, it will be seen that the allegation was "That under the provisions of the National Banking Act, said bank cannot be taxed directly or indirectly except upon its shares

of stock and real estate." And then follows the clause referred to in counsel's brief. It was never intended to allege that the National Banking Act made the provision that the property of banks could be assessed only on the same general basis as other property within said Territory is assessed, but it was meant that that is true without the provisions of the National Banking Act.

V.

The statement is made on page 3 of appellee's brief, also on pages 10 and 15, that it is nowhere alleged in the complaint what is the actual value of the shares of stock of the bank. Facts showing discrimination are, however, fully alleged in the complaint. And on page 15 counsel says: "The utmost that could be claimed upon such a complaint as the one here made would be that as an incident to a general system adopted for the assessment of all banks, this particular bank was assessed too high." We regard these statements as entirely misleading. The inference which counsel seeks to have made is that there is no proper allegation of discrimination.

Appellant has never claimed that there was discrimination between banks in assessment for taxation. The claim made by the complaint is that the discrimination was against all bank property and in favor of all property other than banks.

We never regarded the provision relative to the taxing of banks as unjust between the several banks. We regard the assessment upon the basis of the *capital stock and surplus* as just as between banks; that the

presumption is that the capital stock and surplus is the actual value of the shares of stock. This court has distinctly so held in an opinion delivered by Mr. Justice Field, as follows:

> "A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value depending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively, the nominal value is the true value, any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing."
>
> *Stanley vs. Supervisors*, 121 *U. S.*, 548.

## VI.

On page 17, counsel for appellee states that our objection to the taxation of real estate of banks is on account of double taxation. We distinctly repudiate any such contention, and our contention is fully set forth in our brief. On page 18, he states that our contention would nullify the congressional intent that the shares and the real estate shall both be taxed. We have already pointed out that the National Banking Act is permissive, and not compulsory. And on page

19 he says: "Can it be said when the shares of stock of plaintiff are clearly assessed far below their actual value, that due allowance, whatever that means, had not been made for the value of its real estate?" The allegation was distinctly made in paragraph 7 of the complaint that the Albright assessment was made without deducting the assessed value of the real estate, and in paragraph 9, that the threatened assessment would be so made. So that the complaint leaves no room for conjecture.

## VII.

On page 20 of appellee's brief, he makes the point that the law does not require all property to be assessed upon a uniform basis. He further states: "The only approach to it is the general intent that all property should be assessed at its actual cash value." We think this would require uniformity of taxation. He further states, on page 20: "In many states there are constitutional provisions as to uniformity and equality of taxation. We have nothing of the sort in our organic law." We do not know what counsel means by "our organic law". We understand the Constitution of the United States and acts of Congress to be our organic law, in the sense that they are equivalent to constitutional provisions.

Section 1891 of the Revised Statutes of the United States provides that the constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized,

as elsewhere within the United States:

*Downes vs. Bidwell,* 182 *U. S.,* 271;
*Walker vs. N. M. Etc. Ry.,* 165 *U. S.,* 164;
*Dunphy vs. Kleinsmith,* 11 *Wall.,* 614.

## VIII.

The last point made by counsel for appellee is that no case of equitable jurisdiction is presented. He ignores the allegations in the complaint and the provision in the decree relative to the unpaid portions of the Albright assessment which were a cloud upon plaintiff's real estate, and ordered canceled by the treasurer. The contention against enjoining the threatened assessment is all made upon the proposition that the return of the plaintiff and the assessment by Albright were not legal. The proposition advanced by counsel, if carried to its legitimate conclusion, means that unless returns and assessments are made with legal precision, that they are binding on no one, although the taxing officers may have received and the tax-payer paid the amount of taxes due upon his taxable property without question. Such a rule would unsettle all tax proceedings and make it possible for every taxing officer to review the action of his predecessors at will, without regard to the question whether or not taxes had been paid. We submit that the contention is without merit, and that the several points raised by counsel for appellee in his brief do not meet the questions raised by the record in this case.

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